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**BEFORE THE ARIZONA CORPORATION COMMISSION**

Arizona Corporation Commission

**DOCKETED**

JAN 04 2001

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ARIZONA CORPORATION COMMISSION  
DOCUMENT CONTROL

JIM IRVIN  
Commissioner  
WILLIAM A. MUNDELL  
Commissioner  
MARK SPITZER  
Commissioner

DOCKETED BY

88

**In the matter of**

DOCKET NO. S-03280A-08-0000

JOSEPH MICHAEL GUESS, SR.  
2911 E. Calavar Road  
Phoenix, Arizona 85032

**MOTION TO ADMIT INTO  
EVIDENCE A POST-HEARING  
EXHIBIT**

PROGRESSIVE FINANCIAL MANAGEMENT  
2911 E. Calavar Road  
Phoenix, Arizona 85032

JAMES DOUGLAS SHERRIFFS  
5544 East Helena Drive,  
Scottsdale, Arizona 85254

RICHARD GORDON DAVIS  
4330 North 30<sup>TH</sup> Street  
Phoenix, Arizona 85016

RGD  
4330 North 30<sup>TH</sup> Street  
Phoenix, Arizona 85016

RGD ENTERPRISES, INC.  
4330 North 30<sup>TH</sup> Street  
Phoenix, Arizona 85016

IRA JOE PATTERSON  
4330 North 30<sup>th</sup> Street  
Phoenix, Arizona 85016

RANDALL WAYNE SMITH, JR.  
1905 Springlake Court  
Birmingham, Alabama 35215

BALLY OVERSEAS TRADING INC.  
1905 Springlake Court  
Birmingham, Alabama 35215,

**Respondents.**

1 The Securities Division ("Division") of the Arizona Corporation Commission  
2 ("Commission") hereby moves to admit into evidence in the above-captioned proceeding proposed  
3 exhibit S-140, which is attached hereto and respectively marked as an original exhibit. Pursuant to  
4 A.A.C. R14-3-109(Q), the grounds for this motion are as follows:

5 **I.**  
6 **BACKGROUND**

7 The Notice of Opportunity for Hearing Regarding Proposed Order for Relief ("Notice")  
8 was docketed in this matter on April 6, 2000. At the Prehearing Conference held in this matter on  
9 May 11, 2000, counsel for the Division informed the Hearing Officer that the Alabama securities  
10 regulatory agency had unsuccessfully tried to serve the Notice on behalf of the Division on  
11 Respondents Bally Overseas Trading Inc. ("Bally") and Randall Wayne Smith, Jr. ("Smith") at a  
12 Birmingham, Alabama address that was both the "communications office" for Bally and the  
13 residence for Smith. *Prehearing Conference Transcript ("P. C. T."), May 5, 2000, p. 5 line 21--p.*  
14 *7 line 15.* That address was 1905 Springlake Court, Birmingham, Alabama 35215, which Smith  
15 has since admitted was his residence since at least October 1, 1996 and from where he operated  
16 Bally. *Hearing Exhibit ("Exh.") S-138b p. 2; S-138c p. 1. See also Exh. R-1 p. 2.* Indeed, the  
17 Springlake Court address was expressly identified as Bally's "communications office" in its  
18 investment contracts. *Exhs. S-89, S-112b, S-112c, S-113b, S-114, S-115, S-116, S-117.* This  
19 address apparently remained his residence until August 25, 2000 when his address changed to  
20 3325 Willis Drive, Birmingham, Alabama 35243. *Exh. S-138a p. 3.* Although Smith's Springlake  
21 Court residence operated as the principal place of business for Bally, it was not its only place of  
22 business.

23 At all relevant times in this matter, Bally has been a British Virgin Islands ("BVI")  
24 "International Business Company" ("IBC") with a status of "Goodstanding" at the BVI Registry of  
25 Companies, Trade Marks and Patents. *Exhs. S-89, sheet ACC00770; S-92.* An IBC is chartered in  
26 the BVI under the International Business Companies Ordinance, 1984, Cap. 291, as amended

1 (“IBC Ordinance”). This law requires that an IBC “shall at all times have a registered office” in the  
 2 BVI “and the registered office must be an office maintained” in the BVI “by the company or its  
 3 registered agent.” *IBC Ordinance* § 38. Furthermore, “[a]ny summons, *notice*, order, document,  
 4 process, information or written statement to be served on a company incorporated under this  
 5 Ordinance may be served by ... sending it, by registered mail, addressed to the company, at its  
 6 registered office, or ... by sending it by registered mail to, the registered agent of the company.”  
 7 (Italics added.) *IBC Ordinance* § 65(1). As of June 1, 2000, Bally’s BVI registered office and  
 8 registered agent was AMS Trustees Limited, Sea Meadow House, P.O. Box 116, Road Town,  
 9 Tortola, British Virgin Islands. *Exh. S-92*. Pursuant to A.A.C. R14-4-304 (C)(4) and (E)(1), a copy  
 10 of the Notice was duly served on Bally by International Registered Mail, return receipt requested,  
 11 delivered on June 28, 2000 to its “last known business address” at this BVI registered office and  
 12 registered agent. *Exhs. S-1k, S-1l*. Proof of service pursuant to A.A.C. R14-4-(C)(4) was furnished  
 13 by delivery to the Division of the signed return receipt. *Exh. S-1k*.

14 Smith represented himself in contract documents as “President” of Bally; *Exh. S-112b*.  
 15 *sheets ACC00532 and ACC00535; S-112c, sheet ACC00635; S-113b, sheet ACC04484; S-114,*  
 16 *sheet ACC00647; as “Managing Director” of Bally; Exhs. S-89, sheet ACC00772; S-112b, sheets*  
 17 *ACC00534 and ACC00536; S-112c, sheet ACC00636; S-114, sheet ACC00648; and as “Managing*  
 18 *Partner” of Bally. Exh. S-112b, sheet ACC00532; S-112c, sheet ACC00635; S-114, sheet*  
 19 *ACC00647. He executed contract documents on behalf of Bally. Exhs. S-112b, S-112c, S-113b, S-*  
 20 *114, S-115, S-116, S-117. As sole defendant in a federal criminal case, he admitted that he*  
 21 *operated Bally. Exhs. S-138b p. 2; S-138c p. 1. Bally was a business entity owned or controlled by*  
 22 *Smith.*

23 Pursuant to A.A.C. R14-4-304(B)(5) and (E)(1), the Division on June 2, 2000 posted a  
 24 copy of the Notice by International Registered Mail, return receipt requested, to Smith personally  
 25 at his “last known business address” at the BVI registered office of Bally. *Exh. S-139a*. That same  
 26 day, the Division posted another copy of the Notice by International Registered Mail, return

1 receipt requested, to Bally at its BVI registered office and registered agent, as described above.  
2 *Exhs. S-1k, S-1l*. Although the Division received a signed return receipt showing delivery on June  
3 28, 2000 of the Bally mailing, *Exh. S-1k*, no signed return receipt was received by the Division for  
4 the companion Smith mailing nor was the Smith envelope ever been returned to the Division as  
5 undelivered, undeliverable or not accepted. An International Inquiry Form was submitted on behalf  
6 of the Division to the United States Postal Service to trace this Notice mailing to Smith at his BVI  
7 business address.

8 According to the Affidavit of Division Investigator Terence Nelson, docketed on January 3,  
9 2001 and attached hereto as Exhibit AA, the Division received a letter on December 28, 2000 from  
10 the International Claims and Inquiries Office of the United States Postal Service ("USPS")  
11 responding to the International Inquiry Form previously submitted to that office by the Division to  
12 trace the Notice mailing to Smith at his BVI business address. In its letter, the USPS confirmed  
13 that the Notice mailing to Smith was delivered by the BVI postal service on or about June 26,  
14 2000. A true copy of this USPS letter has been marked as proposed exhibit S-140 and attached  
15 hereto.

## 16 II. 17 ARGUMENT

18 According to A.A.C. R14-4-304(B)(5), the signed return receipt is proof of service of a  
19 notice mailed to the "last known business address" of a natural person "*but shall not be the*  
20 *exclusive method of proving service.*" (Italics added.) The USPS notification letter proposed as  
21 exhibit S-140 is equivalent to a signed return receipt for purposes of proving service on Smith on  
22 or about June 26, 2000 at his "last known business address" at the BVI registered office of Bally.  
23 For purposes of the proceedings in this matter, this proposed exhibit supplements Exhibit S-139a  
24 and completes the record to prove service of the Notice on Smith before the hearing commenced  
25 on July 25, 2000. It conclusively establishes that Smith failed to timely request a hearing pursuant  
26 to A.R.S. § 44-1972(D) and A.A.C. R14-4-306(B), independently confirming the factual basis for

1 the Hearing Officer's determination in his Sixth Procedural Order docketed on September 26, 2000  
2 to deny for untimeliness the Request for Hearing filed on behalf of Smith on September 18, 2000.  
3 Finally, it removes any factual issue of sufficiency of service as grounds to challenge the issuance  
4 of a default order against Smith by the Commission in this matter.

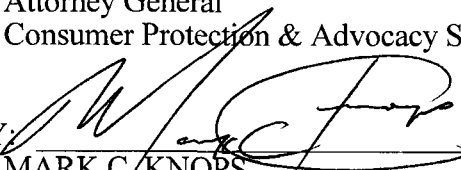
5 Although the proposed exhibit has already been docketed as an exhibit to the Nelson  
6 affidavit, A.A.C. R14-3-109(Z) provides that it shall not be considered unless offered and accepted  
7 in evidence. Since the proposed exhibit was not received by the Division until after the close of  
8 hearing, it is reasonable and appropriate for it now to be admitted into evidence in order to  
9 supplement the hearing record. Furthermore, A.A.C. R14-3-109(G) permits the Hearing Officer to  
10 consent to the introduction of further evidence even after a party "has rested his case."

11 **III.**  
12 **CONCLUSION**

13 For the foregoing reasons, the Division now moves to admit into evidence in this matter the  
14 proposed exhibit S-140. The Division further requests the Hearing Officer to issue a procedural  
15 order ruling on this motion.

16  
17 RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of January, 2001.

18  
19 JANET NAPOLITANO  
Attorney General  
Consumer Protection & Advocacy Section

20  
21 BY:   
22 MARK C. KNOPS  
Special Assistant Attorney General  
23 MOIRA MCCARTHY  
Assistant Attorney General  
24 Attorneys for the Securities Division  
Arizona Corporation Commission  
25  
26

1 ORIGINAL AND TEN (10) COPIES of the foregoing  
2 filed this 4<sup>th</sup> day of January, 2001, with:

3 Docket Control  
4 Arizona Corporation Commission  
5 1200 West Washington  
6 Phoenix, AZ 85007

7 COPY of the foregoing mailed this  
8 4<sup>th</sup> day of January, 2001 to:

9 Joseph Michael Guess, Sr.  
10 2911 E. Calavar Rd.  
11 Phoenix, AZ 85032  
12 RESPONDENT PRO SE

13 Peter Strojnik, Esq.  
14 P. O. Box 34563  
15 Phoenix, AZ 85067  
16 ATTORNEY FOR JAMES DOUGLAS SHERRIFFS

17 Dale L. States, Esq.  
18 6724 N. 43<sup>rd</sup> Ave.  
19 Glendale, AZ 85301  
20 ATTORNEY FOR RICHARD G. DAVIS

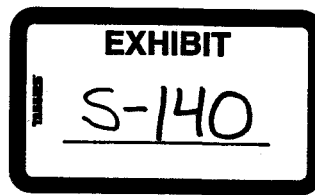
21 Ira Joe Patterson  
22 4330 No. 30<sup>th</sup> St.  
23 Phoenix, AZ 85016  
24 RESPONDENT PRO SE

25 Randall Wayne Smith, Jr.  
26 1905 Springlake Court  
Birmingham, AL 35215  
RESPONDENT PRO SE

Christopher B. Parkerson, Esq.  
Johnson & Mobley  
2101 Fourth Avenue South, Ste. 200  
Birmingham, AL 35233

By: Karen Houk

INTERNATIONAL CLAIMS AND INQUIRIES



October 13, 2000

Case Number: NO044357

D Thomas  
Po Box 866  
Phoenix, AZ 85001

Dear Customer:

This is in further response to the inquiry you recently filed on an international registered letter/letter package, article number R066238060, which you sent to British Virgin Isl..

The postal service of British Virgin Isl. has advised us that this article was delivered on or about June 26, 2000.

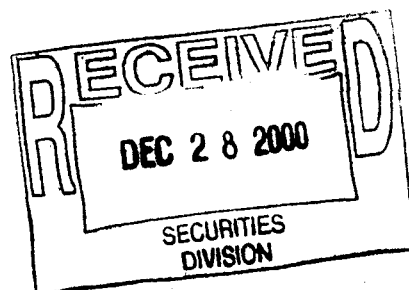
We are pleased to have been of assistance to you in determining the disposition of this article.

Sincerely,

*V.A. Roy*

Supervisor  
International Claims  
and Inquiries Office

701 LOYOLA AVENUE  
NEW ORLEANS, LA 70113-9600  
504-589-1105  
FAX: 504-589-1508



EXHIBIT

AA

STATE OF ARIZONA

County of Maricopa

AFFIDAVIT OF TERENCE NELSON

2001 JAN -3 P 1:47

DOCKET NO. S-03280A-00-0000

I, Terence Nelson, being duly sworn, say as follows:

1. I am a resident of Maricopa County, Arizona and am over the age of eighteen (18).

2. I have personal knowledge of the matters stated in this affidavit and am competent to testify to them.

3. I understand that this affidavit may be used in a court of law.

4. I am an investigator for the Securities Division of the Arizona Corporation Commission.

5. Acting on behalf of the Securities Division, I received from its postal delivery box on December 28, 2000 an original letter from the United States Postal Service dated October 13, 2000, a copy of which is attached hereto as Exhibit A.

6. Exhibit A is a response from the International Claims and Inquiries Office of the United States Postal Service to a request on behalf of the Securities Division to confirm delivery by the British Virgin Islands postal service of International Registered Mail item #R066238060.

7. According to Hearing Exhibit S-139a, an Affidavit of Service admitted into evidence in the above referenced matter by the Seventh Procedural Order of the Hearing Officer docketed October 17, 2000, International Registered Mail item #R066238060 was a copy of the Notice of Opportunity for Hearing Regarding Proposed Order for Relief in this matter that was posted by the Securities Division on June 2, 2000 to Randall Wayne Smith, Jr., c/o Bally Overseas Trading, Inc., AMS Trustees Limited, Sea Meadow House, P.O. Box 116, Road Town, Tortola,



1 British Virgin Islands as the addressee.

2 8. Exhibit A states that the British Virgin Islands postal service delivered  
3 International Registered Mail item #R066238060 on or about June 26, 2000.

4 9. Further affiant sayeth not.

5 AFFIANT:

6 Terence Nelson

7 Terence Nelson

8  
9 SUBSCRIBED AND SWORN TO BEFORE ME this 3<sup>rd</sup> day of January, 2001.



Notary Public State of Arizona  
Maricopa County  
Gary J Kirst  
Expires September 10, 2004

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26

Gary Kirst  
NOTARY PUBLIC

My Commission Expires:

9-10-2004

INTERNATIONAL CLAIMS AND INQUIRIES



October 13, 2000

Case Number: NO044357

D Thomas  
Po Box 866  
Phoenix, AZ 85001

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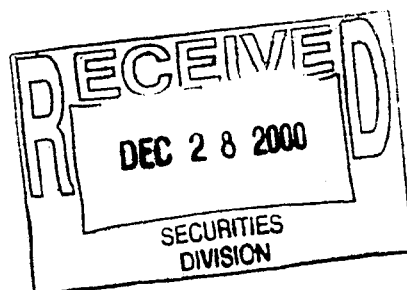
We are pleased to have been of assistance to you in determining the disposition of this article.

Sincerely,

*V.A. Roy*

Supervisor  
International Claims  
and Inquiries Office

701 LOYOLA AVENUE  
NEW ORLEANS, LA 70113-9600  
504-589-1105  
FAX: 504-589-1508



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